No. 20,781

IN THE

United States Court of Appeals

For the Ninth Circuit

TAIL CLERKS UNION, LOCAL NO. 1179, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

vs.

ATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review, Modify and Set Aside an Order of the National Labor Relations Board

REPLY BRIEF FOR PETITIONER

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Table of Authorities Cited

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In view of certain statements made by Respondent in its counterstatement of the case which result in distortion of the pertinent facts, Petitioner desires to emphasize and place in proper perspective certain facts which have a critical bearing upon the resolution of the issue on appeal which is whether there is substantial evidence to support Respondent NLRB's finding—contrary to the finding of the Trial Examiner who heard the case—that the Employer in bad faith declined to recognize and bargain with the Union.

Thus, although Respondent, in its brief, characterizes Mr. Peri, who owns fifty per cent of the shares of the employer corporation and who is the general manager thereof, as completely inexperienced in labor relations and, therefore, impliedly oblivious to the realities of the meeting at which Petitioner demanded recognition as the representative of the Employer's sales personnel, the conclusion is inescapable that Peri was in fact well prepared for Petitioner's visit.

Peri knew that for ten days prior to the meeting of September 25, 1964, at which Petitioner's representatives made their demand for recognition, Petitioner had been picketing the premises of the Employer (R. Vol. 1-B, p. 143). Subsequent to his knowledge of the picketing, *and in direct consequence of it,* Peri, who Respondent implies had no idea what was going on when Petitioner presented him with its demand for recognition, in fact, had had meetings and conferences with representatives of the employer association which represented *John P. Serpa, Inc.* in labor relations with other unions (R. Vol. 1-A, p. 10; R. Vol. 1-B, pp. 169, 170.) Grudging admissions by Peri on cross-examination reveal that these meetings concerned discussions at length about the Petitioner's organizational activities and establish that Peri had knowledge, forewarning and ample preparation as to Petitioner's organizational purpose. Peri also admits that between the time the picketing commenced and the time of the demand he discussed the picketing with Union agents Paddock and Atkinson (R. Vol. 1-B, pp. 168, 169).

Thus, on September 25, 1964 the Petitioner's officials met with a well prepared Peri. The demand for recognition of the Petitioner as the collective bargaining representative of the sales employees was made, and the signed authorization cards of a majority of these employees were given to Peri for his inspection. The record is clear that Peri *carefully* examined these cards (contrary to Respondent's assertion that Peri only "glanced briefly" at them—Respondent's Brief, p. 3), and admitted that the cards contained the signatures of all of his salesmen except Freitas and Davis (R. Vol. 1-A, p. 18; Vol. 1-B, p. 158). He had the option of checking them against his payroll records (R. Vol. 1-A, pp. 83-84) or having a third party check them (R. Vol. 1-A, pp. 28-29), but only seven familiar employees were involved. The cards were valid, and Peri knew that he had been presented with evidence which he had no reason to doubt and which established that five of his seven employees wanted the Union to represent them. In sum, Peri accepted the fact that he had been presented with valid authorization cards signed by five of his seven employees. In fact, Peri never, at any time—not even during the Hearing—attempted to deny the fact that he had no doubt on September 25, 1964 that the Petitioner did in fact represent a majority of his sales employees.

When Peri pleaded ignorance as to what Petitioner wanted by its demand for recognition, Roddick suggested that Peri then and there call Peri's lawyer.

Peri said that he could not reach his lawyer so late in the day (it was almost 6:00 P.M.), and told Roddick that he could "probably get him tomorrow" (R. Vol. 1-A, p. 20). Roddick gave Peri his business card and wrote on it Roddick's home phone number so that Peri could reach him over the weekend. In spite of this unequivocal continuing demand for recognition and the continuation of the picketing, Peri never again communicated with Roddick or any other of Petitioner's officials, except that he told one of the Petitioner's business agents some five days later that he would *never* sign a recognition agreement with Petitioner (R. Vol. 1-A, p. 74).

The Trial Examiner, upon hearing all the evidence in proceedings before him, and personally observing the demeanor and other indications of credibility of the witnesses, concluded that the employer did not have a good faith doubt of the Petitioner's majority status at the time of Petitioner's demand for recognition on September 25, 1964, and apparently just "clung to the hope that the Union would just go away" (R. Vol. 1, p. 16).

In its brief the Respondent repeats the language of the Board's decision to the effect that the Board adopted the "fact findings, credibility resolutions and conclusion of the Trial Examiner" (Respondent's Brief, p. 6). It is respectfully submitted that if the fact findings and credibility resolutions of the Trial Examiner are adopted, the refusal to bargain charge must be upheld.

This failure to *in fact* give proper weight to the Trial Examiner's findings of fact and credibility resolutions constitutes the defective foundation for Respondent's entire argument. Respondent advances three contentions in its attempt to avoid the simple and direct fact that its Trial Examiner who observed the witnesses concluded that Peri did not have a good faith doubt as to the Union's majority status.

First, Respondent attempts to bury under misleading citations the fact that this Court has properly and accurately stated its function upon review of Decisions and Orders of the National Labor Relations Board. Thus, in *Snow & Sons v. NLRB,* 134 NLRB 709, enf'd 308 F. 2d 687 (9th Cir., 1962), this Court clearly set forth the Supreme Court's *Universal Camera* criterion for review of an NLRB decision in which the Board does *not* agree with its Trial Examiner on issues of fact, and credibility. (See Petitioner's Opening Brief at pages 8 and 9.)

Respondent cites several decisions purportedly controlling on the question of review of Respondent's findings and conclusions on the issues of fact. Each case, however, has distinguishing features and none purport to change the landmark rule of *Universal Camera.*

Thus, in *International Woodworkers v. NLRB* (C.A.D.C.), 263 F. 2d 483, cited by Respondent at page seven of its brief, the court quotes the Supreme Court's decision in *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, as follows:

> Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. (263 F. 2d 483, 485.)

And, in *Oil Chemical & Atomic Workers v. NLRB,* ..... F. 2d ..... (C.A.D.C., 1966), 62 LRRM 2238, cited by Respondent at page seven of its brief in support of its findings and decision herein, the court pointed out in terms pertinent to the instant case as follows:

> The Board cannot satisfy its statutory function merely by stating that it disagrees with a Trial Examiner. *It must make clear the basis of its disagreement.* Its decision must be presented in such form as to enable this Court to pass intelligently on that decision, and *to determine whether it is rationally related to findings and supported by substantial evidence. Retail Store Employees Union v. NLRB,* U.S. App. D.C. ....., ... F. 2d ....., 59 LRRM 2763 (July 13, 1965). In our opinion the Board properly discharged this function. Its decision sets forth and makes clear that the Examiner's decision was given attentive consideration. . . . *It suffices that the Board addressed itself to key items of evidence* which were crucial in terms of the Company's alleged status as employer, and *fairly indicated the basis on which it was drawing inferences contrary* to those of the Examiner. (62 LRRM 2238, 2240; emphasis added.)

Under the *Universal Camera* rule and the above-quoted interpretations thereof, the Respondent's de-

termination herein that the General Counsel did not introduce "any evidence" whatever bearing on the lack of good faith of the Employer cannot be upheld.

Secondly, in its attempt to avoid coming to grips with the real issue as to the Trial Examiner's first-hand conclusion that Peri, in fact, had no good faith doubt, Respondent does this Court a disservice by interjecting an argument which can only be characterized as a "red herring".

Thus, Respondent, in its brief, by repeated allusions to the Employer Association (Respondent's Brief, pp. 2, 3, 5, and 11, and footnotes 2, 3, 4, 6 and 17) attempts to retroactively create a defense for the Employer to the effect that the Employer properly refused to recognize and bargain with Petitioner because Petitioner's demand was not for an appropriate unit. However, Peri did not raise the question of unit during the September 25, 1964 demand meeting. And the Employer itself later filed an RM petition with the NLRB, stating that a unit identical to the unit sought by Petitioner was the appropriate unit (R. Vol. 1-A, p. 8). Moreover, the fact that the unit sought by Petitioner is an appropriate unit was stipulated by the parties at the Hearing. Respondent's General Counsel in his brief to the Trial Examiner stated as follows:

> Respondent stipulated that the unit set forth in Paragraph VI of the Complaint (G.C. Exhibit 1-c) is an appropriate unit (Tr. 7-8) and that the said unit, as of September 25, 1964, and at all times material to this case, consisted of

> seven nonsupervisory employees, viz.: Hubert E. Lee; Joe T. Pace; Richard Stevens; W. H. "Wid" Hoskins, II; A. L. Bravo, Jr.; Joe Freitas; and John Davis (Tr. 11-12). There is no past history of bargaining for a unit of salesmen employed by the Respondent (Tr. 39, 49) or by any other member(s) of the Contra Costa Automotive Association. The Board has directly passed on this point, and has found the single-employer unit appropriate. See *Lownsbury Chevrolet Company,* 101 NLRB 1752, almost identical to the instant case on the facts. See also *Manhasset Motors, Inc.,* 137 NLRB 443, 445; *Weaver-Beatty Motor Co.,* 112 NLRB 60, 63.

And the Trial Examiner and the Board held that the unit sought by Petitioner was an appropriate unit (R. Vol. 1, p. 15 and R. Vol. 1, p. 23).

Respondent's third method of avoiding the significant fact as found by the Trial Examiner that Peri actually had no good faith doubt of the Union's majority status on September 25, 1964 consists of an attempt to distinguish between a third party card check and a direct, personal examination of the cards by the Employer.

Thus, Respondent, in its Brief, attempts to convince the Court that cards checked by a stranger against a payroll are somehow more "reliable" than cards examined by the boss himself. There is an obvious inconsistency when the Board which has repeatedly recognized and sanctioned card checks now argues that an examination "cannot, alone, indicate

the circumstances under which the signatures were solicited or obtained, or resolve the question whether the cards reliably express the employees' desire for representation." (Respondent's Brief, pp. 12-13.)

Because this case involved a direct examination of the cards by the boss and not a third party cross check, Respondent in its brief at page 13 states: "There is no evidence in this case that the employer had independent, reliable knowledge that the Union represented a majority of his employees when he declined recognition." (Respondent's Brief, p. 13.) That the fallaciousness of this attempt to distinguish between the reliability of a third party card check and a direct card check is known to Respondent itself is best exemplified by the Board's own language in *Jem Mfg. Co., Inc.,* 156 NLRB No. 62:

> Ordinarily, the General Counsel sustains this burden of proof by demonstrating that an employer has engaged in other unfair labor practices which are designed to dissipate a union's majority status. However, an employer's bad faith may also be demonstrated by a course of conduct which does not constitute an independent unfair labor practice. Thus, in *Snow & Sons* the employer's objective of seeking delay and its rejection of the collective-bargaining concept was manifested when it repudiated a previously agreed upon card check indicating the union's majority status by continuing to insist on an election. Similarly, in *Kellogg Mills,* the Board found that the employer had manifested bad faith when, after a card check by a third party which established the union's majority and the actual

> commencement of bargaining negotiations, the employer withdrew from negotiations and demanded an election upon the advice of newly hired counsel. The only relevant difference between *Kellogg Mills* and this case is that in the former a third person made the card check which satisfied the employer that the union represented a majority, whereas in this case the Employer himself examined the cards to determine the Union's majority. *This difference in the means of checking a union's majority is of no significance: an employer's check certainly is as reliable as that by a third party.* (Footnotes deleted; emphasis supplied.)

As its final position, Respondent argues that its General Counsel did not offer any evidence to demonstrate that the Employer's refusal to recognize the Union was based on bad faith. It is respectfully submitted that the Board is failing to give due weight to the Trial Examiner's conclusion, based on his first-hand appraisal of Peri, that Peri was not acting in good faith when he refused to extend recognition to the Union since he had no doubt as to the Union's majority status in an appropriate unit.

At the Hearing, Peri advanced various spurious reasons for his refusal to grant recognition. He deliberately feigned ignorance of what the demand meeting was all about and attempted to mislead as to his conversations with and attempts to contact his own attorneys. Only by a first-hand appraisal of Peri's direct testimony as compared to his vacillating and evasive replies to cross-examination, can a valid judg-

ment be made as to Peri's true reason for refusing to extend recognition.

The courts have repeatedly had occasion to remind the Board that there is no *per se* refusal to bargain, but that in each case the party's state of mind must be examined to see if he truly had a good faith doubt. The Trial Examiner, on the evidence before him, including the credibility determination as to Peri, was significantly informed to make a determination as to whether or not Peri, in fact, had a good faith doubt. The Trial Examiner concluded that Peri did not have a good faith doubt. The Board has not fairly indicated a basis to support the drawing of the contrary inference, nor has it given "attentive consideration" to the evidence supporting the Trial Examiner's finding.

Thus, this Employer was well prepared for the Union's demand for recognition. He carefully scrutinized the authorization cards and accepted their validity. He raised no question as to any doubt whatsoever of the Union's majority status in the appropriate unit. He declined to recognize the Union. He wanted time to consult his attorney. After consulting his attorney he still failed to extend recognition to the Union whose officials were awaiting his telephone call. At the NLRB hearing he suggested false and misleading reasons to disguise the plain fact that although he had no good faith doubt as to the Union's majority status in the appropriate unit, he continued to refuse to extend recognition to the Union.

In addition to the evidence discussed hereinabove, which is itself sufficient to require a reversal of the Respondent's decision and order, evidence was adduced at the Hearing with respect to incidents of Employer violence and threatened violence against Petitioner's pickets. Contrary to the assertion of Respondent (Respondent's Brief, pp. 20-24), these matters were fully litigated and do offer admissible, reinforcing evidence of the Employer's motivation, state of mind, and absence of good faith. *Bernel Foam Products Co.,* 146 NLRB 161; *Johnnie's Poultry Co.,* 146 NLRB 98. The fact that these incidents were not specifically alleged in the Complaint does not preclude a finding as to commission of these independent unfair labor practices within the meaning of Section 8(a)(1) of the Act. See *Frito Company v. NLRB* (9th Cir., 1964), 330 F. 2d 458; *Associated Home Builders of the Greater East Bay v. NLRB* (9th Cir., 1965), 352 F. 2d 745.

Thus, the totality of the evidence in this Record overwhelmingly supports the finding of the Trial Examiner that the Employer had no good faith doubt as to the Union's majority status when recognition was refused. Therefore, it is respectfully submitted that the Board erroneously dismissed the Complaint when it expressly determined that there was no evidence to support a finding of lack of good faith doubt on the part of the Employer.

The order of the Respondent should be set aside and the Respondent should be ordered by the Court to

find that the Employer violated Section 8(a)(5) of the Act when it refused to bargain with Petitioner upon request and to thereupon issue an order requiring the Employer to recognize and bargain with Petitioner.

Dated, San Francisco, California,
October 17, 1966.

Respectfully submitted,

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